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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 871

UPCHURCH PACKING COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOSEPH B. BRENNAN,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ:	
I. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Interwoven Stocking Co.* v. *United States*, 144 F. (2d) 768	5
II. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court	6
Conclusion	9
Appendix	10

CITATIONS

Cases:

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	6
Anniston Mfg. Co. v. *Davis*, 87 F. (2d) 773	8
Becker Steel Co. v. *Cummings*, 296 U. S. 74	8
Brinkerhoff-Faris T. & S. Co. v. *Hill*, 281 U. S. 673	7
Cummings v. *Deutsche Bank*, 300 U. S. 115	8
Ettor v. *Tacoma*, 228 U. S. 148	7
Graham v. *Goodcell*, 282 U. S. 409	7
Interwoven Stocking Co. v. *U. S.*, 144 F. (2d) 768	5
Lynch v. *U. S.*, 292 U. S. 571	8
Roomberg v. *U. S.*, 40 F. Supp. 621	7
United States v. *Butler*, 297 U. S. 1	3

Statutes:	Page
Agricultural Adjustment Act of 1933	2
Judicial Code:	
Sec. 24(20)	7
Sec. 240(a)	2
Revenue Act of 1936:	
Title VII	3
Sec. 902	4, 6, 7, 8, 10
Sec. 903	7, 11
Sec. 904	7, 11
Sec. 905	7, 12
Sec. 906	12
Sec. 910	12
Sec. 913	12
Revised Statutes:	
Sec. 3220	7
Sec. 3226	7
Sec. 3477	3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Upchurch Packing Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on November 20, 1945, affirming the judgment of the United States District Court for the Northern District of Georgia.

Opinions Below

The opinion of the District Court (R. 10-15) is reported at 53 F. Supp. 791. The opinion of the Circuit Court of Appeals (R. 21-28) is reported at 51 F. (2d) 983.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 20, 1945 (R. 28-29). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)).

Question Presented

Where processing taxes imposed under the unconstitutional Agricultural Adjustment Act of 1933 were collected from Petitioner's predecessor corporation, an abattoir, which slaughtered hogs for Petitioner for a fee, and the amount of such taxes was charged to and borne by Petitioner, and where thereafter, but prior to the enactment of the Revenue Act of 1936, the abattoir transferred all of its assets to Petitioner, pursuant to a plan of reorganization, and thereafter dissolved, is Petitioner entitled to recover the illegal exaction on a claim for refund timely filed by Petitioner?

Statutes Involved

The applicable statutory provisions are set forth in the Appendix, pp. 10, *infra.*

Statement

This action was brought by Petitioner in the District Court to recover custom processing taxes illegally collected, under the Agricultural Adjustment Act of 1933 (48 Stat. 31), from Petitioner's predecessor corporation, Atlanta Butchers Abattoir, hereinafter called the "Abattoir". Respondent filed a motion for judgment dismissing the complaint upon the ground that the complaint did not state a claim against Respondent upon which relief could be granted (R. 9). The District Court, holding that Peti-

tioner was not entitled to recover upon the basis of the facts alleged in the complaint, entered judgment dismissing the complaint (R. 15-16), and the Circuit Court of Appeals affirmed this judgment (R. 28-29).

The following facts are alleged in the complaint, the legal sufficiency of which is denied by the judgment of the court below:

In 1933, 1934 and 1935 the Abattoir slaughtered hogs for Petitioner and paid to the Collector of Internal Revenue "custom" processing taxes under the Agricultural Adjustment Act of 1933 (R. 3, 4-5). The Abattoir collected the amount of such taxes from Petitioner by adding it as a specific item to the customary fee for slaughtering (R. 6). Petitioner in turn bore the burden of the tax and did not shift the burden to others (R. 6-7).

In December 1935, pursuant to a plan of reorganization, Petitioner acquired all of the assets and assumed all of the liabilities of the Abattoir, and the Abattoir was thereafter dissolved (R. 3-4). At all times W. F. Upchurch was sole stockholder of both corporations (R. 3).

The processing tax was held invalid by this Court on January 6, 1936. *United States* v. *Butler*, 297 U. S. 1. On June 22, 1936 the Revenue Act of 1936 was enacted, and Title VII of that Act imposed certain restrictions on refunds of processing taxes (49 Stat. 1648, 1747).

On June 30, 1937, within the time prescribed by law, Petitioner filed a claim for refund of processing taxes paid by the Abattoir, and after disallowance of the claim by the Commissioner of Internal Revenue this action was commenced (R. 7).

The Government conceded (R. 11) that the assignment of the claim for taxes paid by the Abattoir, in connection with the corporate reorganization, did not violate the prohibition of Section 3477 of the Revised Statutes, relating

to the assignment of claims against the Government. The Circuit Court of Appeals held that Petitioner was not entitled to recover because it construed Section 902(a) of the Revenue Act of 1936 as limiting refunds to claimants who paid the tax to the Government, and as denying any recovery to a taxpayer's lawful assignee who bore the burden of the tax.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the complaint failed to state a cause of action, and in affirming the judgment of the District Court dismissing the complaint.

2. In holding that Petitioner was not a "claimant" within the meaning of Section 902 of the Revenue Act of 1936 because the tax was not paid to the Collector by Petitioner, but by Petitioner's predecessor corporation and lawful assignor.

3. In failing to hold that if Petitioner was not a "claimant" within the meaning of Section 902 of said Act, Petitioner would be entitled to recover, without regard to the restrictions of said section, under the general provisions of law with reference to the refund of internal revenue taxes erroneously or illegally collected.

4. In holding that Congress, by virtue of the sovereign immunity to suit, undertook in Section 902 of the Revenue Act of 1936 to withdraw, *pro tanto,* the Government's consent to be sued.

5. In failing to hold that Section 902 of the Revenue Act of 1936 should be construed as simply denying refunds of processing tax, on the purely equitable ground of preventing unjust enrichment, to the extent that claimants have not borne the burden of the tax, but have shifted the burden to others.

6. In failing to hold that Petitioner had a vested right of action for the recovery of processing taxes illegally collected from its predecessor, and that this right could not be destroyed, under the circumstances of this case, without violating the due process clause of the Fifth Amendment to the United States Constitution.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Interwoven Stocking Co.* v. *United States,* 144 F. (2d) 768.

In the *Interwoven Stocking Co.* case it appeared that a parent corporation was engaged in the business of selling and distributing the product manufactured by its subsidiary. The processing tax was imposed on and paid by the subsidiary, which in turn passed the tax burden on to the parent. After payment of the tax the subsidiary was merged into the parent. It was held that the parent, though not the taxpayer, was entitled to recover in its suit the processing taxes illegally collected from its subsidiary.

The court below, recognizing factual differences between the two cases, said:

> "But we agree with appellant that in substance the two cases are the same, and if we could agree with it that the (Interwoven Stocking Co.) case was well decided, we should agree with it that the judgment appealed from here should be reversed" (R. 27).

In both the *Interwoven Stocking Co.* case and the case at bar the tax was imposed on and paid by a corporation which passed the burden of the tax on to another corporation; the taxpayer-corporation ceased its separate existence after paying the tax; and the corporation that had borne the tax burden succeeded to all the property and rights of the taxpayer. In each case the claimant was not the taxpayer, but

acquired the taxpayer's right of action by lawful transfer or assignment. The equitable restrictions of Section 902 were held not to deny a refund to the claimant in the *Interwoven Stocking Co.* case, to the extent that the burden of the tax was borne by it and not shifted.

2. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court. The Circuit Court of Appeals reached its decision herein by giving to Section 902 of the Revenue Act of 1936 a construction inconsistent with this Court's construction of the same section in the case of *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

In the *Anniston* case, the plaintiff had sued for the recovery of processing taxes without meeting the restrictions on refunds imposed by Section 902. This Court was asked to hold that section invalid on the ground that it impaired the plaintiff's vested right of action to recover amounts collected from it as taxes under an unconstitutional statute. In answering the constitutional attack, this Court construed Section 902 as simply restricting refunds on the basis of the "same equitable principles that underlie an action in assumpsit for money had and received." That type of action, the Court said, "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff". 301 U. S. at 350. This Court said further:

> "Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the same canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even come so near to doing so as to raise a serious question of constitutional law'." 301 U. S. at 351-352.

This Court therefore justified the impairment of the plaintiff's right of action in the *Anniston* case only in so far as it was subject to an equitable defense.[1] In the present case Petitioner had a vested right of action for the recovery of the processing tax paid by its predecessor and lawful assignor, and the Circuit Court of Appeals for the Fifth Circuit construed Section 902 as denying Petitioner any recovery, under circumstances where Petitioner had borne the burden of the tax and was not subject to any equitable defense.

The lower court's technical construction is strained and unsound. If, as the court below held, a "claimant" within the meaning of Section 902 is limited to a claimant who himself paid the tax to the Collector, then a recovery could never be allowed under Section 902 where the taxpayer is dead or dissolved and where the claim is prosecuted by the taxpayer's personal representative or statutory successor.[2] No such legislative intent could be reasonably inferred from the language of the section. Cf. *Roomberg* v. *United States*, 40 F. Supp. 621 (E. D. Pa.).

The court below took the position that the *Anniston* case "is not at all in point" because there suit was brought against the Collector, whereas the present action is against the United States (R. 25). But the statute must have the

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[1] If construed otherwise, the section would be invalid as impairing vested rights of action. *Graham* v. *Goodcell*, 282 U. S. 409, 429; *Ettor* v. *Tacoma*, 228 U. S. 148, 156. Due process of law requires some fair and effective remedy with reference to the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673.

[2] If the word "claimant" in Section 902 should be given such a narrow construction, then the restrictions there imposed would not apply at all when a claim is prosecuted by the lawful assignee of the taxpayer. In such a case a refund should be allowed under general provisions of law relating to the refund of internal revenue taxes erroneously or illegally collected. See Revised Statutes, Secs. 3220, 3226 (26 U. S. C. A., Secs. 3770, 3772); Judicial Code, Sec. 24(20) (28 U. S. C. A., Sec. 41(20)); Revenue Act of 1936, Secs. 903, 904, 905 (49 Stat. 1648, 1747-1748).

same meaning in both suits; and the construction which this Court gave the statute in the *Anniston* case, in order to avoid constitutional doubts, must be just as controlling in a case like the present.

The Circuit Court of Appeals had no difficulty, with reference to constitutional doubts, in construing Section 902 in such a way as to deny recovery here, because it considered that no matter how harsh and arbitrary the restrictions of Section 902 might be, the section would still be valid as a withdrawal, *pro tanto*, of the Government's consent to be sued (R. 24-25).[3] It is submitted that Section 902 should not be construed as an assertion of the sovereign immunity to suit or as an imposition of conditions on which the Government consents to be sued. The section imposes restrictions on *refunds* whether "in pursuance of court decisions or otherwise". Congress was seeking in Section 902 to restrict the *right* to recover, as distinguished from the remedy, and it should not be inferred that Congress intended to raise the shield of sovereign immunity against any attacks on the validity of the restrictions. Cf. *Lynch* v. *United States*, 292 U. S. 571, 583, 585-587; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79-80; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120.

The readiness of the court below to invoke the sovereign immunity to suit as an easy means of avoiding constitutional questions as to Government obligations is in marked contrast to the approach taken by this Court in similar cases. Cf. *Lynch* v. *United States, supra; Becker Steel Co.* v. *Cummings, supra; Cummings* v. *Deutsche Bank, supra.*

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[3] The same judge, writing the opinion of the Circuit Court of Appeals in the *Anniston* case, upheld the restrictions of Title VII on the same theory of sovereign immunity. 87 F.(2d) 773. In affirming the judgment, this Court relied in its opinion on the equitable basis of the restrictions of Section 902, as construed by this Court, and said that the judgment of the Circuit Court of Appeals was being affirmed "but upon the grounds stated in this opinion". 301 U. S. at 357.

In this aspect the present case is one of substantial public importance, involving governmental integrity, and calls for the exercise of this Court's supervisory powers.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

SEC. 902. Conditions on Allowance of Refunds.

"No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

"(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

SEC. 903. Filing of Claims.

"No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes."

SEC. 904. Statute of Limitations.

"Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought."

SEC. 905. Jurisdiction of Courts.

"Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases."

SEC. 906. Procedure on Claims for Refunds of Processing Taxes.

"(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section * * *."

SEC. 910. Liability of Collectors.

"No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government."

SEC. 913. Definitions.

"When used in this title—

"(a) The term 'tax' means a tax or exaction denominated a 'tax' under the Agricultural Adjustment

Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

"(b) The term 'processing tax' means any tax or exaction denominated a 'processing tax' under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee. * * *"

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	9

CITATIONS

Cases:

Arabi Packing Co. v. *Commissioner*, 109 F. 2d 278 — 6, 7

Cohen v. *Swift & Co.*, 95 F. 2d 131, certiorari denied, 304 U. S. 561 — 9

Fidelity Mutual Life Ins. Co. v. *Clark*, 203 U. S. 64 — 5

Fuhrman & Forster Co. v. *Commissioner*, 114 F. 2d 863, certiorari denied, 312 U. S. 686 — 6

Helvering v. *Metro. Edison Co.*, 306 U. S. 522 — 8

Hughes Tool Co. v. *Commissioner*, 147 F. 2d 967 — 8

Interstate Transit Lines v. *Commissioner*, 319 U. S. 590 — 7

Interwoven Stocking Co. v. *United States*, 144 F. 2d 768 — 6, 8

Jaeger, Oswald, Baking Co. v. *Commissioner*, 108 F. 2d 375, certiorari denied, 309 U. S. 683 — 6

Lash's Products Co. v. *United States*, 278 U. S. 175 — 6

Lindner Packing & P. Co. v. *Commissioner*, 118 F. 2d 656 — 6

Moline Properties v. *Commissioner*, 319 U. S. 436 — 8

Planters Oil Co. v. *Hopkins*, 286 U. S. 332 — 8

Statutes:

Agricultural Adjustment Act of 1933, 48 Stat. 31 — 3

Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 902 (7 U. S. C. 644) — 2, 5

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 871

UPCHURCH PACKING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 10–15) is reported at 53 F. Supp. 791. The opinion of the Circuit Court of Appeals (R. 21–28) is reported at 151 F. 2d 983.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 20, 1945. (R. 28–29.) The petition for a writ of certiorari was filed on February 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether, under Section 902 of the Revenue Act of 1936, the petitioner, whose sole stockholder was also the sole stockholder of a corporation which had paid processing taxes under the Agricultural Adjustment Act, may secure a refund of any of those taxes, despite the fact that the taxpayer, whose assets were subsequently acquired by the petitioner, could not establish that it had borne the burden of the taxes, that burden having been shifted to the petitioner.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant,

or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644.)

* * * * *

STATEMENT

This suit was brought by the petitioner for the recovery of custom processing taxes paid by the Atlanta Butchers Abattoir & Stockyards Company under the Agricultural Adjustment Act of 1933, 48 Stat. 31. The cause of action is pleaded

in two counts[1] (R. 2–8), the first upon the claim that the petitioner bore the burden of the tax it seeks to recover and the second upon the claim that it is inherently impossible to establish by proof to what extent it bore the burden of the tax.

The first count alleged the following facts: During the period November, 1933, to May, 1935, the Atlanta Butchers Abattoir & Stockyards Company, a corporation, to which, for convenience, we shall refer as the Abattoir, slaughtered hogs for customers, of whom the petitioner was one, and, as the first domestic processor under the Agricultural Adjustment Act, paid processing taxes imposed under that Act in the amount of $45,183.85 (R. 4).

The Abattoir collected from its customers the amount of the processing taxes it paid by adding that amount to its usual charge for slaughtering. Of the processing taxes paid by the Abattoir, $33,968.11 was paid upon slaughtering done for the petitioner. (R. 5.)

During the period in which the taxes were paid by the Abattoir, W. F. Upchurch was the president and sole stockholder of the appellant and of the Abattoir. On December 28, 1935, in accordance with a plan for reorganization duly adopted by the stockholders of the petitioner and of the Abattoir, the petitioner acquired all of the assets of the Abattoir in consideration of the issuance

[1] The complaint contained a third count which was dismissed upon stipulation (R. 16).

of 100 shares of its stock to the stockholders of the Abattoir. The Abattoir was dissolved on December 29, 1936, by order of the Superior Court of Fulton County, Georgia. (R. 3–4.)

The petitioner bore the burden of a substantial portion of the tax paid by the Abattoir upon the slaughtering of its hogs and in no manner shifted the burden of the amount by which the charge for slaughtering was increased to cover the tax (R. 7).

The second count repeats the allegations of the first and alleges, in addition, that it is impossible to ascertain the extent to which the petitioner shifted the burden of the tax (R. 8).

The Government moved for judgment on the pleadings (R. 9) upon the ground that none of the counts in the complaint states a claim upon which relief can be granted. This motion was granted with respect to the first and second counts (R. 10–15) and judgment was entered (R. 15–16) dismissing the complaint.

The Circuit Court of Appeals affirmed this judgment of the District Court (R. 29).

ARGUMENT

1. The courts below correctly held that the petitioner stood in the shoes of its assignor and had no better claim than did its assignor. *Fidelity Mutual Life Ins. Co.* v. *Clark,* 203 U. S. 64, 74. Under Section 902 of the Revenue Act of 1936, *supra,* the right to refunds of taxes collected

under the Agricultural Adjustment Act is limited to amounts "paid by or collected from any claimant as tax" to the extent that the claimant can show that he has in fact borne the burden of the tax. The Abattoir which paid the tax had no right to recover since it admittedly did not bear the burden of the tax, and the petitioner, as its assignee, has no different claim.

The fact that Abattoir shifted to the petitioner the burden of the taxes imposed in the slaughtering of hogs for the petitioner did not give the petitioner a claim against the United States; no part of the processing taxes claimed were paid by or collected from the petitioner *as taxes;* the petitioner simply paid to the Abattoir an increased fee for its services because of the tax. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176; *Arabi Packing Co.* v. *Commissioner,* 109 F. 2d 278 (C. C. A. 5th); *Lindner Packing & P. Co.* v. *Commissioner,* 118 F. 2d 656 (C. C. A. 10th); *Oswald Jaeger Baking Co.* v. *Commissioner,* 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Fuhrman & Forster Co.* v. *Commissioner,* 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686. Hence the court below was correct in affirming the decision of the district court, holding that the petitioner had not stated a claim on which relief could be granted.

2. While the court below disagreed with the decision of the Circuit Court of Appeals for the Third Circuit in *Interwoven Stocking Co.* v.

United States, 144 F. 2d 768, we think that there is no direct conflict between the decisions. In the *Interwoven Stocking Company* case, the facts, as summarized by the court, were that the Interwoven Stocking Company had all of its products manufactured by a wholly owned and completely dominated subsidiary operating as a production department of the parent's business, and that the Interwoven Company was the only customer of the subsidiary. Subsequent to the payment by the subsidiary of floor stock taxes under the Agricultural Adjustment Act, the subsidiary was merged with the parent company.

The Third Circuit held that there was no change of identity worked by the merger and that the taxes paid by the subsidiary were recoverable by the parent corporation upon its showing that it had borne the burden of the tax. The decision was based on the premise that there was, in substance, but one business and one taxpayer both before and after the merger, and that the taxpayer suing to recover was the same person that paid the tax and bore the burden of it. While we think that the decision was incorrect in holding that the separate entities of parent and subsidiary should be disregarded (see *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593), and in failing to hold that strict compliance with the limitations imposed by Section 902 is necessary to a recovery of a tax collected under the Agricultural Adjustment Act (see *Arabi Pack-*

ing Co. v. *Commissioner, supra*), the instant case does not involve the same situation. The Abattoir was not a subsidiary of the petitioner or a production department of its business but a distinct entity which slaughtered hogs for the petitioner and other customers and required its customers, including the petitioner, to pay a charge which was increased by the amount of the tax. The fact that all of the stock of each corporation was owned by the same individual does not justify the disregard of the separate entities of these corporations. See *Moline Properties* v. *Commissioner,* 319 U. S. 436; *Planters Oil Co.* v. *Hopkins,* 286 U. S. 332.

In this case there was no identity of the corporations when the taxes were paid and there was no statutory merger nor any *de facto* merger resulting from an absorption of a subsidiary by a parent company. There was merely a purchase of the assets of the processor by its former customer (the petitioner) in exchange for stock of the customer. In such a case the identity of the old corporation does not continue in the purchasing corporation. See *Helvering* v. *Metro. Edison Co.,* 306 U. S. 522, 527, and *Hughes Tool Co.* v. *Commissioner,* 147 F. 2d 967 (C. C. A. 5th). Even if we assume that the transaction qualified as a reorganization for tax purposes, the *Interwoven Stocking Company* case does not necessarily support the view that a successor to the assets and liabilities of one corporation as the result of a

reorganization may claim a right against the Government which neither had before.

3. If, as the court below held, the petitioner has not met the statutory requirements for a refund, it is clear that it has no constitutional grievance. Petitioner paid no tax, and, in fact, had not even a common-law right against the processor, Abattoir, to whom it paid the moneys in question. *Cohen* v. *Swift & Co.*, 95 F. 2d 131 (C. C. A. 7th), certiorari denied, 304 U. S. 561.

Moreover, the argument that, under the decision of the Circuit Court of Appeals, a recovery could never be had where the taxpayer is dead, or, if a corporation, is dissolved, is absurd. In such cases, the suit could be freely brought by the personal representative of the deceased person or the successor of the corporation, but the right to recover would be subject to the same limitations as it would have been in a suit by the taxpayer.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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